

Velcro Canada Inc v The Queen, 2012 TCC 273

TCC Has Absolute Discretion in Awarding Costs and Is NOT Limited to Special Circumstances Before Looking Beyond the Tariff

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At issue is the authority of the TCC to award costs under the TCC Rules.

The Court stated that the Tariff annexed to the Rules is a reference point " only should the Court wish to rely upon it" [emphasis original]. The Tariff makes reference to Rule 147, which in subsection 147(4) grants the TCC extremely broad authority in the awarding of costs. The TCC in considering costs ought to begin by looking first at the factors in Rule 147(3), and only after having done so, ought it look to the Tariff if it so chooses.

The Court stated:

Under the Rules, the Tax Court of Canada does not even have to make any reference to Schedule II, Tariff B in awarding costs. The Court may fix all or part of the costs, with or without reference to Schedule II of Tariff B and it can award a lump sum in lieu of or in addition to taxed costs. The Rules do not state or even suggest that the Court follow or make reference to the Tariff. [emphasis original]

The taxpayer was wholly successful on an appeal against the MNR and sought costs above the tariff amount on the basis that:

- the Appellant was entirely successful in the appeal;
- the amount at issue was in excess of \$9 million;
- the issues raised in the appeal were of national and international importance; and
- the novelty of the issues dictated that the Appellant spend a substantial amount of time and resources in preparing for and presenting the appeal.

The Court stated that the Crown's position that the TCC cannot award costs above Tariff barring exceptional circumstances such as misconduct or undue delay was confused.

The Court began by referring to the decision of Bowman J in *Bank of Canada et al v. R.*, [1994] T.C.J. No. 863, where it was said:

It is obvious that the amounts provided in the tariff were never intended to compensate a litigant fully for the legal expenses incurred in prosecuting an appeal. The fact that the

amounts set out in the tariff appear to be inordinately low in relation to a party's actual costs is not a reason for increasing the costs awarded beyond those provided in the tariff. I do not think it is appropriate that every time a large and complex tax case comes before this court we should exercise our discretion to increase the costs awarded to an amount that is more commensurate with what the taxpayers' lawyers are likely to charge.

[...]

In the normal course the tariff is to be respected unless exceptional circumstances dictate a departure from it. Such circumstances could be misconduct by one of the parties, undue delay, inappropriate prolongation of the proceedings, unnecessary procedural wrangling, to mention only a few. None of these elements exists here.

The Court then referred to the decision of Hogan J in *General Electric Capital Canada Inc. v. Canada*, 2010 TCC 490, before stating that " it does not take exceptional circumstances to justify a deviation from the Tariff – far from it. The authority of the Tax Court of Canada is quite clear."

Rule 147(1) grants the TCC total discretion in terms of (1) the amount of costs; (2) the allocation of costs; and (3) who must pay them, and reads:

147(1) The Court may determine the amount of costs of all parties involved in any proceeding, the allocation of the costs and the persons required to pay them.

Rule 147(3) sets out the factors to be considered in exercising the discretionary power, and ends with an extremely broad power to consider "any other matter relevant to the question of costs". Factors a court may consider include, but are not limited to:

1. the actual costs incurred by a litigant and their breakdown including the experience of counsel, rates charged, and time spent on the appeal;
2. the amount of costs an unsuccessful party could reasonably expect to pay in relation to the proceeding for which costs are being fixed; and
3. whether the expense incurred for an expert witness to give evidence was justified.

The Court also noted Rules 147(4) and (5) which grant increasingly broader power to the TCC in awarding costs. They read:

147(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

147(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

- (a) to award or refuse costs in respect of a particular issue or part of a proceeding,
- (b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or
- (c) to award all or part of the costs on a solicitor and client basis.

The court concluded that:

1. The Tariff was never intended to compensate a litigant fully for legal expenses incurred in an appeal;
2. The Tariff was also never intended to be so paltry as to be insignificant and play a trivial role for litigants in dealing with their litigation. The Court's discretionary power is always available to fix amounts as appropriate;
3. Costs should be awarded by the Court in its sole and absolute discretion after considering the factors of subsection 147(3);
4. The discretion of the Court must be exercised on a principled basis;
5. The factors in Rule 147(3) are the key considerations in the Court's determination of costs awards as well as the quantum and in determining if the Court should move away from the Tariff;
6. In the normal course the Court should apply the factors of Rule 147(3) on a principled basis, with submissions from the parties as to costs, and only reference the Tariff at its discretion; and
7. The manner that the Tariff is referenced in Rule 147 indicates the insignificance of the Tariff in costs considerations.